IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
[2018] EWHC 3447 (Ch)

No. CR-2018-003655

Rolls Building

Fetter Lane

London EC4A 1NL

Thursday, 3 May 2018

Before:

MR JUSTICE HILDYARD

IN THE MATTER OF **SCL GROUP LIMITED & OTHERS** (Company No. 05514098)

A N D

IN THE MATTER OF **SCL ANALYTICS LIMITED** (Company No. 09838667)

A N D

IN THE MATTER OF **SCL COMMERCIAL LIMITED** (Company No. 08840965)

A N D

IN THE MATTER OF **SCL SOCIAL LIMITED** (Company No. 08410560)

A N D

IN THE MATTER OF **SCL ELECTIONS LIMITED** (Company No. 08256225)

A N D

IN THE MATTER OF **CAMBRIDGE ANALYTICA (UK) LIMITED** (Company No. 09375920)

A N D

IN THE MATTER OF **THE INSOLVENCY ACT 1986**

J U D G M E N T

A P P E A R A N C E S

MR A. RICHARDSON (instructed by Tiger Law) appeared on behalf of the Applicant Companies.

PROFESSOR M. WATSON-GANDY (instructed by Underwood LLP) appeared on behalf of the Proposed Joint Administrators.

(Transcript prepared from poor quality audio)

MR JUSTICE HILDYARD:

1 These are applications for administration orders in respect of six English companies, namely SCL Group Limited, SCL Analytics Limited, SCL Commercial Limited, SCL Social Limited, SCL Elections Limited, and Cambridge Analytica (UK) Limited (the "Applicants" or "Companies"). The applications were made as a matter of urgency to me yesterday, 02 May 2018, the relevant applications, so I understand, having been issued on the previous evening.

2 When the applications were first made, they were coupled also with applications in respect of two other entities, namely Cambridge Analytica LLC and SCL USA Inc., both those entities being US corporations with their current headquarters in the United States. I shall return to them briefly, but for the present suffice it to say that the difficulties of establishing that their centres of main interest were in this country eventually persuaded the Applicants not to seek orders in respect of them though I understand that some insolvency processes are to be commenced this day in the relevant jurisdictions in the United States of America.

3 I should also mention that when the matter came before me there was reference also to another English company within the Group, namely SCL Insight Limited, but I was told that the shares of Insight had been sold, I think last Tuesday or thereabouts, to one of the directors so that no order was sought in respect of that company.

4 The circumstances in which these applications are brought are undoubtedly fraught, and the applications, despite, no doubt, midnight oil, bear hallmarks of a certain element of rush. Furthermore, the context in which the applications have been brought is not only untidy, but also the subject of very considerable, and I think it is no exaggeration to say world-wide, speculation. That speculation is chiefly focused on Cambridge Analytica, though, in point of fact, as I understand it, Cambridge Analytica (UK) Limited has been a dormant company. However, the activities of Mr Alexander Nix, the then principal mind of the group, and the involvement of the group, which I refer to as the Cambridge Analytica Group, including in particular the use of information said to have been deployed in the context of elections both in the United Kingdom and the United States, which is said to have involved abuse of information derived from customers of Facebook, have obviously led to considerable speculation and interest.

5 The court, of course, must proceed on the evidence and not by reference to such speculation. But I think it is fair to record that I felt it appropriate to ask whether the parent company of the Group, a company called Emmerdata Limited, was always intended to be involved in any of the businesses undertaken by the subject companies and, counsel for the Applicants having taken instructions, confirmed that it was not and it was not so intended. That is to be recorded in a witness statement.

6 Two further factors of dislocation, one extremely recent, the other less so, have also complicated the court's assessment of the matter. The first is the fact that, in consequence of concerns as to the activities, especially I think in the political field, of the Cambridge Analytica Group, the Information Commissioner's Office has become directly concerned, and it has, and did, in March, I think, seek and obtain warrants enabling it to remove from the various offices, apparently, servers and computer equipment, to assess the rights and wrongs of what has been supposed from the raw material. However, in the process, it has also, so I am told, removed some or all of the accounting books and records of the various companies resulting in it being extremely difficult, if not impossible, to measure with any degree of accuracy what is the financial position now of the various Companies. This is

significant, it being accepted that the court has to have regard to the financial position of individual companies, even if, in the exercise of its discretion, it may also be mindful as to the overall position of the Group.

7 Accordingly, these applications come forward on the unusual basis of the Companies' financial positions being supposed on the basis of the available information, and the general likelihood of things in light of speculation which it is said has put customers off and greatly interfered with the business of the Group, as is readily understandable. That being so, there is really more assessment than measurement as to the financial position of the companies.

8 The proposed administrators of each of the Companies, Mr Vincent John Green and Mark Newman of Crowe Clark Whitehill (the "Proposed Joint Administrators"), have been involved in an exploratory sense, but there have obviously been limitations as to what they can do prior to their appointment, and these have extended to perceived inability (or lack of utility) in them approaching the ICO for further information. Indeed, it would appear that communication with the ICO as to the return of the books and records (or at all) has ground to a halt. The last letter which counsel for the Applicants was able to provide me with is dated 4 April 2018. There seems to have been no communication of substantive kind since.

9 The second, and very recent matter, which has complicated the position is that though, when the matter was in the course of hearing before me yesterday, I was given to understand that a certain measure, at least, of confidentiality was requisite and, indeed, though this was not in the end sought, my papers had been marked with a request on behalf of counsel that the matter be heard in private, in the result it has transpired that a press release was made in the United States, I believe in New York to the Wall Street Journal, stating that, in view of all the speculation and consequent adverse effect, all the companies in the Cambridge Analytica Group would be shutting down. Given that, at that stage, the application was live before me and I had adjourned it in light of various concerns, and given that I had, in deference to the delicate state of things, indicated that the matter would not formally be listed, that press coverage came as something of a surprise.

10 Whilst counsel for the Applicants and counsel for the Proposed Joint Administrators fought valiantly to make or derive some positives from this otherwise negative event, in terms of, in effect, bad publicity being better than none, and in terms of it simply emphasising the urgency of the situation and the need to have proper direction of the company as soon as possible placed into the hands of an independent person, the announcement cannot have improved, in reality, the prospects of a quick and organised sale of the business with its employees attached.

11 I asked for an explanation of this turn of events and Mr Richardson, on behalf of the Applicants, did his best to explain it in terms of it being a necessary announcement, given other speculation, and that the companies concerned had wanted to get out into the open that they had instructed leading counsel, Mr Julian Malins QC, to investigate the allegations and that he had opined to the effect that the allegations were not substantiated. Nevertheless, as I say, it has both discomfited and destabilised the process in this Court.

12 All that said, and whatever the sounds and the fury, the task of the court, generally, and in particular when its adjudication is sought as to whether to make an administration order, is to first address the matters which are the preconditions of its jurisdiction. This requires it to determine whether it can be satisfied, first, that the company is or is likely to become unable to pay its debts in the case of each Applicant and, second, again in the case of each Applicant, that the administration order is reasonably likely to achieve the purpose of administration. These tests do not require the court to consider that a 50 per cent threshold

is comfortably exceeded, but they do require the court to be persuaded that there is a real prospect that, if insolvency is established, one or more of the statutory purposes might be achieved. As I say, that is a gateway to the jurisdiction. The discretion of the court remains general and the powers of the court remain broad, as is stated in para.13 of Schedule B1 to the Insolvency Act 1986 ("IA 1986"), and include, for example, in addition to making the administration order, the alternative of treating the application as a winding up petition and making any order which the court could make under section 125 IA 1986.

13 In the fraught circumstances I have sought to describe above and given that the balance seemed to me to be a very fine one in terms of whether I could be so satisfied, I, as may already be implicit, adjourned the matter over until today, 3 May 2018. As perhaps I should earlier have mentioned, there was an additional technical reason for that, which was that the resolutions appointing the director, a Mr Julian Wheatland, who gave the relevant witness statements to bring the applications, appeared internally defective since he was appointed as a director at a meeting at which no directors were present. The adjournment enabled that to be corrected and ratified by unanimous approval of the only shareholders. As I have said, over the course of the evening and night, the bombshell of the public announcement also had to be taken into account.

14 Given the state of uncertainty as to the financial position of each company, it was frankly acknowledged by both the Applicant's counsel and counsel for the Proposed Joint Administrators that satisfying the test on a balance sheet basis would be next to impossible. They instead sought to satisfy me upon the footing that, as a matter of fact, the companies were, in each case, not in a position to pay their customers and creditors, and they had not done so, that the speculation was entirely undermining of their ability to do so in the future and that the position was the worse because customers who had paid deposits were, in many instances, requiring immediate repayment.

15 Accordingly, it was submitted that, on the alternative cashflow test, whilst the precise figures could not be identified, the first component of the statutory test was satisfied in that it could be said, in all the fraught circumstances, that each company was likely to become unable to pay its debts. With some necessary uncertainty, I would be disposed to accept that since the circumstances do seem to make it inherently likely that the pressures on these companies, and each of them, will be considerable.

16 Before turning to the second part of the test, I should also mention that, immediately prior to the application being brought, there was an outstanding floating charge registered in favour of Barclays Bank plc. Given the overnight adjournment, I also asked that the position in that regard be clarified, especially in point of whether there had been a rapid repayment or whether it was simply a charge stuck on the register which could be, as it were, removed by consent as a ministerial matter. The answer I was given, which is to be confirmed in a witness statement, is that that charge was only extant to cover potential drawdowns on an overdraft facility which had never been used. Accordingly, no monies had had to be expended in its satisfaction beyond, possibly, expenses. On the basis of that evidence, I am prepared to accept that that element of the preconditions applicable has also been satisfied.

17 The second, and most important branch, or element of the statutory precondition is, as I have mentioned, that the administration order is reasonably likely to achieve the purpose of administration. This is often a difficult matter to assess. Usually, there is a relatively straightforward assessment, at least in one sense, which is a comparison of the relevant figures, on the one hand, of insolvent liquidation, or similar process; and on the other, of administration. That, for reasons already evident, was not really possible in this instance.

18 The long and the short of it is this: that it is put to me that whilst administration would be the more expensive option in terms of the costs of the process, there are other costs of liquidation, including redundancy payments, which must be taken into account and, furthermore, and crucially, it was emphasised that there was some hope, so it was suggested, that the Companies could be sustained as going concerns and the value of their intellectual property and work in progress and the amorphous value of a transfer of their employees could be realised for value, whereas, in a liquidation all would be entirely lost.

19 The Group's employees are employed by SCL Elections, which employs in this country, as I was given to understand, sixty-one employees. That must also be confirmed in the witness statement.

20 It is at this point, of course, that the weight of the sudden announcement that the Companies were being shut down becomes of particularly acute concern and, in the light of it, I directed a yet further short adjournment to enable the Proposed Joint Administrators specifically to consider whether, on mature and objective assessment, they did still adhere to the view that there was a real prospect, sufficient to justify the application, of realising value upon sale. I also invited them to consider very carefully the facts evident on the ground with respect to that proposed sale, namely that, whilst two people, one unnamed and the other Mr Nix, who I have already had occasion to mention, were (or may be) insiders, any other purchasers would be, to some extent, hamstrung and possibly put off by the lack of firm financial information, again for the reasons I have described. I asked them to consider most carefully whether the sale on which the prospect of the administration offering a better route depended would actually come to fruition. I also canvassed the possibility of either the Companies or the Proposed Joint Administrators or both approaching the ICO with a view to seeking some assistance in that regard, as to the financial state of the company.

21 After what I must take to have been careful examination of the position, as proposed officers of the court and as insolvency practitioners owing their obligations accordingly, counsel on their behalf informed me, after the short adjournment today, that they did still consider that there was that real prospect in the case of each of the companies. Furthermore, they emphasised the need, if that were not be falsified by the effluxion of time, for the most urgent appointment, and I was told that a team was ready in London to take control of the businesses whereby to bring order sufficient to promote a realistic sale.

22 I also enquired of them how they were to be paid the considerable sums which may be incurred. I think the sums given to me were in the region of £309,000. I was belatedly informed that, so far as that could not come out of the assets of the Companies, it would be met by the parent company, Emmerdata. I therefore asked the Proposed Joint Administrators to consider whether the identity of their paymaster might make more difficult the independence required of them.

23 As I hope will be painfully obvious from the length of time taken in respect of an application which normally is accomplished within the half hour, I have found this a most difficult balance to strike. I have, I must acknowledge, been much tempted to appoint instead the Official Receiver as liquidator, but, in the end, and relying as I do on the sober assessment of the insolvency practitioners concerned, I feel that the balance comes down, just, in favour of supposing that there is a real prospect of a better result in the event of administration and therefore that, unless there are some other supervening or overriding reasons why in the exercise of my discretion I should refuse that relief, I should permit the matter so to proceed. This is the case especially since it does or would result in the reins

being immediately taken up by professional persons independent of the present directors and answerable to the court.

24 So far as the wider considerations are concerned, I have been troubled, especially given the state of apparent silence between the Companies, the Proposed Joint Administrators and the ICO lest the making of the orders might provide some impediment or cause an advantage to the Applicants which would be inappropriate in the circumstances. However, again in the round and with some equivocation, and bearing in mind that, so far as I am aware, the ICO does not consider that its inquiries would be impeded in any way nor any action it might consider appropriate by it or by the relevant authorities stultified, I shall permit the administrations to proceed.

25 I should also record, firstly, that any sales that are contemplated will not be pre-pack or semi-pre-pack, they will be proposals put to the creditors at the statutory meetings and properly and transparently explained. Secondly, that the presently envisaged first marketing steps thought to be capable of being accomplished within the next seven to ten days, if they elicit no third-party response, would cause the Proposed Joint Administrators to, if not immediately apply for liquidation, at least return to the court to explain further the difficulty. In that regard I have requested and received the further assurance that, whilst the relevant Statement of Insolvency Practice 16 would not be relevant assuming there to be no pre-pack, nevertheless the principles underlying it will, so far as capable of application, be adhered to.

26 I want to make it entirely plain that, having invited disclosure and relied on it, it is not the intention or supposition of the court by granting an administration order in any way to prevent the further inquiries undertaken presently by the ICO or any consequences which may follow from that. It is simply an order to ensure that the value of these previously, as I understand it, successful companies should not, in effect, be lost at a stroke and sixty-one employees lose their jobs accordingly.

27 I will require the orders to be lodged, including the undertakings with respect to evidence that I have indicated. I will review this judgment when the transcript is available, for which purpose I would ask for expedited transcription, and I will hear counsel as to the time and date at which the orders are to be made effective.